Supreme Court, U.S.
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No. 97-1193

In The

# Supreme Court of the United States

OCTOBER TERM, 1997

REMINGTON INVESTMENTS, INC.,
*Petitioner,*
v.
XEP NGUYEN, ET AL.,
*Respondents.*

**Petition For Writ Of Certiorari**
**To The California Court of Appeal**
**For The Second Appellate District, Division Seven**

## RESPONDENTS' BRIEF IN OPPOSITION

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## COUNTERSTATEMENT OF QUESTION PRESENTED

Does a state court of appeal properly find that a holder of a note from a failed bank is barred from collecting on the note when: (1) the undisputed facts show that the bank abandoned the collateral which secured the note under a commercial business loan and security agreement; and (2) relevant state statutory law prohibits recovery by a lender when the lender improperly disposes of securing collateral?

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## PRELIMINARY STATEMENT

This Court exercises its discretion to grant a petition for certiorari only when motivated by "special and important reasons." S. Ct. Rule 10.1. Contrary to petitioner Remington Investment, Inc.'s characterizations, no such reasons exist here. The lower court's not-for-publication decision is of no special interest to anyone except the parties involved. It does not unsettle or create any conflict of law, does not ignore the supremacy of federal jurisprudence (to the extent that federal law is even implicated) and does not even serve as citable precedent for parties outside the confines of this dispute. Accordingly, Respondents, Mr. Xep Nguyen, et al., respectfully request that this Court deny the petition seeking review of the unpublished opinion of the California Court of Appeal, Second Appellate District, Division Seven.

## COUNTERSTATEMENT OF THE CASE

When Greyhound closed its downtown Los Angeles bus terminal, Mr. Nguyen's doughnut shop located in the terminal was forced to close too. (Pet 2a) Mr. Nguyen surrendered the collateral for the shop's business loan under his security agreement with the bank. (Pet. 2a-3a) The bank, however, abandoned the collateral, and when the FDIC took over the bank, Remington purchased the "asset" of Mr. Nguyen's note and attempted to collect from him. (Pet. 3a) Remington's efforts failed because the surrendered collateral was not disposed of in a commercially reasonable manner as required by the California Commercial Code. (Pet. 4a-5a) All of this is set forth concisely and completely in the unpublished opinion below. (Pet. 1a-7a)

The factual statement in Remington's petition contains several points requiring response. First, Remington states, "Nguyen has not disputed the unpaid balance on the Note." (Pet. 2) Not so. Mr. Nguyen's position has always been that he does not owe any outstanding balance because the undisputed facts show that he surrendered collateral which should have satisfied the remaining debt.

Second, Remington states that there was no testimony as to what happened to the collateral [Pet. 4], but then surmises that the "collateral seemed to have disappeared." (*Id.*) Yet Remington may not draw the conclusion that the collateral was ever moved or "disappeared" because there is admittedly no evidence on that point. Along the same lines, Remington asserts it "had no way of locating the bank officer." (Pet. 4) Not so. Witnesses *can* be located when parties *try* to find them. Here, Remington made no effort to contact any of the persons involved. Indeed, Remington never conducted any discovery in this case, instead hoping it could win solely on the law, regardless of the facts. As a result, Mr. Nguyen's evidence -- the only factual evidence presented to the trial court -- was controlling and that evidence showed how the bank abandoned the collateral.

## REASONS WHY THE PETITION SHOULD BE DENIED

### A. The Result Reached Here Was Based On California's Commercial Code Without Implicating Federal Law

Remington accuses the California Court of Appeal of ignoring the supremacy of federal law in reaching the decision below. But the Court of Appeal ignored none of Remington's arguments and the opinion is well within the mainstream of the established law, both state and federal. The foundation for the opinion is the unremarkable proposition that if a debtor surrenders collateral under a security agreement, then the creditor must act reasonably in disposing of that collateral and failure to reasonably dispose of collateral bars subsequent attempts to collect a judgment on the debt. (Pet. 6a) Remington attempts to invoke federal (and state) law to disregard the relevant facts and excuse the bank's abandonment of the collateral. But as the court of appeal held below, these arguments are unavailing when the *record* is considered.

For example, Remington argues that the bank never took possession of the collateral but merely expressed an intent to do so. (Pet. 5, 10) Remington asserts -- without citation to any legal authority -- that a "secured party retains the option [of using collateral to offset a debt] until it has clearly taken possession of the collateral." (Pet. 18) But whether possession over collateral has been taken is hardly a matter of federal concern. Indeed, it is a highly fact-dependent legal question determined as a matter of state law under California's Commercial Code.

Remington's failure to conduct discovery also prevents it from disputing the facts, which reveal that the bank exercised its right to take the collateral by: (1) confirming orally and in writing that it was going to do so; (2) sending a bank officer to visit the premises, gaining entry by showing the property management company the bank's security interest in the equipment inside the building; and (3) exercising control over the property by giving it away. This conduct defeated the Nguyen's ability to use the collateral to satisfy the debt and therefore barred Remington from further relief.

Mr. Nguyen had done all that a reasonably borrower could do. After relinquishing the collateral he could fairly assume that the bank would handle things from there. He had no responsibility or ability to ensure that the bank would properly handle his collateral and he had no idea the bank had failed to do so until he was sued four years later by Remington.

## B. The Federal D'Oench Duhme Doctrine Does Not Apply Here Because There Was No Side-Agreement To Impair Bank Assets

Remington argues that review is needed to prevent California's courts from "playing fast and loose with the clear and controlling federal law" (Pet. 22) But it is Remington who plays fast and loose with the facts and law in its petition. Remington presents a one-sided view of the law -- never mentioning the contrary authority cited by Mr. Nguyen. Remington further unfairly characterizes the state court's rulings and reasoning to make it appear that two trial court judges and three appellate court justices

somehow overlooked relevant federal precedent. But Remington took every opportunity to highlight the law it believed to be relevant; and every judge who has reviewed the factual record and that law concluded it simply does not apply. The D'Oench Duhme doctrine has not been ignored; it simply has no application here.

In that regard, Remington never confronts the analysis reflected in the California Court of Appeal's unpublished opinion, because it cannot. That court found D'Oench Duhme inapplicable because there was no agreement to impair bank assets. First, there was no agreement of the sort contemplated by the doctrine -- only instructions directing compliance with the requirements of a pre-existing commercial security agreement. That form contract provided that the loan collateral had to remain at the doughnut shop and in case of default the bank would have full power to enter the premises and dispose of the collateral to offset the debt. Thus it was already an integral part of the contract that the collateral would cover the loan and thus there was no side deal of the sort D'Oench Duhme aims to prevent.

Second, the election to take collateral did not defeat or diminish bank assets; indeed, the election was a benefit to the bank. If the bank's interests were defeated here, it was not because the bank opted to exercise its right to the collateral, but by the bank's own carelessness in mishandling that collateral.

Therefore, the court of appeal perceived that the factual predicate for application of Remington's federal law -- *i.e.*, a side-agreement to diminish bank assets -- was absent. (Pet. 5a-6a) And because the obligation to dispose of surrendered collateral in a commercially reasonable way

is statutorily required [Cal. Com. Code § 9504(3)], it is not the sort of side-agreement to diminish assets assailable by D'Oench, Duhme. (Pet. 6a) As the opinion concludes, any diminishment of bank assets here occurred simply as a result of the bank's own "careless conduct." (*Id.*)

Further, the determination that the D'Oench, Duhme doctrine does not apply to situations of improper disposal of collateral (the conclusion reached by every judge who has examined this case) is consistent with other relevant authority nationwide. *E.g., S&S Diversified Servs. v. Arguello*, 911 F. Supp. 498, 503 (D. Wyo. 1995) (improper disposal of collateral "is of an entirely different type [of defense] than the secret side agreements that are barred by the D'Oench, Duhme doctrine and 12 U.S.C. § 1823(e)"); *accord, Texas Refrigeration Supply, Inc. v. FDIC*, 953 F.2d 975 (5th Cir. 1992).

Simply put, Remington portrays this case to be far more momentous than it is. It is not a case where an FDIC assignee could not produce a bank officer -- Remington never tried -- or where a scheme was concocted by debtors and accomplices to defraud a lender.[1]

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[1] Remington's reference to its other pending petition for certiorari (*Remington v. Hamedani*, No. 97-984) is inapposite as that case concerns vastly different facts and relevant law (*e.g.*, no issue regarding abandonment of collateral; offensive, rather than defensive, use of D'Oench Duhme). The only similarity is Remington's reliance on an inapplicable doctrine.

## CONCLUSION

The unpublished decision of the California Court of Appeal correctly analyzed the issues and found, on the undisputed facts, that summary judgment was properly granted. No factors should motivate this Court to exercise discretion to address this case which poses no legal conflict or important public policy issues. This matter simply fails to present the sort of substantial legal question deserving of review by the highest court in the land. The parties and judicial system already have invested far more resources examining a bank's failure to collect the collateral of Mr. Nguyen's doughnut shop than should ever have been incurred. Remington's petition for a writ of certiorari should be denied.

Respectfully submitted,

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